APPEAL NO. 172017
FILED OCTOBER 3, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 29, 2017, with the record closing on July 24, 2017, in (city), Texas, with (administrative law judge) as the administrative law judge (ALJ).[1] The ALJ resolved the issues before her by determining that the respondent (claimant) has not reached maximum medical improvement (MMI) and, for such reason, an impairment rating (IR) cannot be assigned. We note the ALJ, in her Decision and Order, listed the claimant's name as Mr. A.

The appellant (carrier) appealed the ALJ's determination that the claimant has not reached MMI and that, for such reason, no IR can be assigned as being contrary to the evidence. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a compensable injury on (date of injury), while dragging heavy machinery out of a truck. The parties stipulated that the compensable injury includes a lumbar sprain/strain, a lumbar L4-5 annular bulge aggravated and lumbar radiculitis.

MMI/IR

Section 401.011(30) provides MMI means the earlier of: (A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104. Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

[1] Section 410.152 was amended in House Bill 2111 of the 85th Leg., R.S. (2017), effective September 1, 2017, changing the title of hearing officer to ALJ.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination. Rule 130.1(d)(1) states that a certification of MMI and assignment of an IR requires completion, signing, and submission of the Report of Medical Evaluation (DWC-69) and a narrative report.

(Dr. C) was appointed by the Division as designated doctor to determine MMI and IR. Dr. C examined the claimant on December 1, 2016, and filed a DWC-69 dated December 12, 2016, certifying that the claimant had not reached MMI. In his report, Dr. C indicated that the claimant was participating in a chronic pain management program and was expected to reach MMI on or about February 15, 2017, following completion of such program.

On July 12, 2017, following the CCH, the ALJ requested clarification from Dr. C because of a question concerning whether his certification of not at MMI on December 12, 2016, may have been based, in part, upon the claimant's congenital lumbar stenosis, a condition not found to be part of the compensable injury. In his July 14, 2017, response to the ALJ's request, Dr. C stated that his determination of not at MMI was based solely upon the compensable lumbar sprain/strain, L4-5 aggravated annular bulge, and lumbar radiculitis. Dr. C further stated that "I offered no change to my prior assessment of not at MMI." With his response to the ALJ's request for clarification, Dr. C filed a second DWC-69, dated July 14, 2017, again indicating that the claimant was not at MMI but was expected to reach MMI on February 15, 2017, a date nearly six months preceding the date of the DWC-69.

(Dr. K), the carrier's choice of physician, examined the claimant on January 23, 2017, and determined that the claimant, having completed all Official Disability Guidelines-indicated diagnostic testing and treatment, including completion of the chronic pain management program, had reached MMI as of that date. Dr. K assigned an IR of five percent under Diagnosis-Related Estimate Lumbosacral Category II pursuant to the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides).

In his narrative report, Dr. K indicates that the claimant was taken off work from September 1 through September 14, 2014, so the eighth day of disability in this case could have been as early as September 8, 2014; however, we note that the parties did not stipulate or litigate the date of statutory MMI. Based upon the evidence in this case, it appears the date of statutory MMI may have passed; however, we do not have sufficient evidence of that date. The Appeals Panel has previously held that it is legal error to determine a claimant has not reached MMI in a Decision and Order dated after the date of statutory MMI. *See* Appeals Panel Decision (APD) 131554, decided September 3, 2013. Accordingly, we reverse the ALJ's determination that the claimant has not reached MMI and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. The ALJ is to determine whether Dr. C is still qualified and available to serve as designated doctor. If Dr. C is no longer qualified or available, then another designated doctor is to be appointed.

The ALJ is to take a stipulation from the parties regarding the date of statutory MMI. If the parties are unable to stipulate to the date of statutory MMI, the ALJ is to make a determination of the date of statutory MMI in order to inform the designated doctor of the date of statutory MMI.

The ALJ is to advise the designated doctor of the date of statutory MMI and request that the designated doctor give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination. The date of MMI cannot be after the date of statutory MMI.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge